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No. 85-5319

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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WILLIE JASPER DARDEN,

*Petitioner,*

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

*Respondent.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## BRIEF OF THE PETITIONER

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## QUESTIONS PRESENTED

1. Did the prosecution's calculated, unprofessional and inflamatory closing argument rob the determination of petitioner's guilt of the fundamental fairness required by due process and deprive the determination of his sentence of the reliability required by the eighth amendment?

2. Whether the exclusion for cause of a potential juror solely on the basis of his scruples against capital punishment can be reconciled with the decision of the Court in *Wainwright* v. *Witt*, 469 U.S. ____, 83 L.Ed.2d 841 (1985)?

3. Whether petitioner was denied the effective assistance of counsel at the sentencing phase of his trial, depriving him of a full, fair, and individualized determination of whether he should live or die?

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## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2241.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution of the United States, which provides in relevant part: "In all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense"; the eighth amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"; and the fourteenth amendment, which provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

## STATEMENT OF THE CASE

### I. STATEMENT OF THE FACTS

#### A. The Crime And The Evidence At Trial

Carl's Furniture Store in Lakeland, Florida, was held up early in the evening of September 8, 1973. One of its owners,

Carl Turman, was shot and killed as he entered through a back door. Phillip Arnold, a sixteen-year-old who lived nearby, was shot and wounded as he sought to give aid to Mr. Turman. The gunman also attempted a sexual assault on Mrs. Turman.

Just a few moments after these events, Willie Jasper Darden, a black man, lost control of his car and struck a telephone pole a little over three miles from the furniture store. At the time, he was on weekend furlough from a Florida prison and was returning to his girlfriend's house in Tampa. A few hours later, Mr. Darden was arrested at the home of his girlfriend for leaving the scene of an accident. Later the same night, he was charged with the murder of Mr. Turman, the attempted murder of Mr. Arnold, and the robbery that accompanied these shootings. R.586.[1]

The state's case rested primarily on identifications of their black assailant by the white victims, Mrs. Turman and Mr. Arnold, and limited forensic evidence. The latter consisted of testimony by a deputy sheriff that, a day and one-half after the crime, he found a .38 caliber pistol in a ditch under four inches of water thirty-nine feet from the highway and about an equal distance from the place of petitioner's automobile accident. R. 503-04, 511. It was shown at trial that the pistol was the same caliber as the murder weapon and that four bullets had been fired from it in a sequence that matched the shooting during the crime. The prosecution was unable to connect the pistol to the crime by ballistic or other forensic evidence. R. 357-58, 514, 517-22.

Mr. Darden testified at length. R. 571-659. He told how his automobile had skidded from the highway in wet weather as he hastened back to Tampa from Lakeland to meet his girlfriend and attend a wedding later on that evening. R. 574-76. He explained that, with the aid of a passing motorist, he had

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[1] Citations to the transcript of the trial record are designated as R. ____. Citations to the record on appeal to the Florida Supreme Court are designated as A.R. ____. Citations to the hearing before the federal magistrate on habeas corpus are designated as H.C. ____. Citations to the Joint Appendix are designated as J.A. ____.

sought unsuccessfully to locate a wrecker to take the disabled auto in tow. Failing in this effort, he had obtained a ride to Tampa. This was corroborated by the State's witnesses, who also noted Mr. Darden's calm and poise during this episode. R. 577-579, 330-31, 334-35, 340-41. Mr. Darden denied that he had been at the furniture store or had had anything to do with the crimes with which he was charged. R. 592-93, 598-99.

Mr. Darden's testimony concerning the events of the evening of September 8, 1973, was both plausible and partially corroborated by the state's evidence. Apart from the identification testimony of Mrs. Turman and Mr. Arnold, it was not in direct conflict with the state's evidence. Thus, to a large degree, the state's case rested on the "jury's determination of the credibility of Darden's alibi testimony as against the eye-witness testimony of the victims." *Darden* v. *Wainwright*, No. 79-566 Civ. T-H, Slip op. at 22 (M.D. Fla. April 15, 1981) (Magistrate's Recommendation and Report). (J.A. 214).

This eyewitness testimony was not without substantial problems. Immediately after the offense, Mrs. Turman told officers that she could not remember what the subject looked like or what he was wearing. This was, she explained, because she was scared to look while the crime was in progress, and at one point covered her face with her hands so she would not have to see. R. 240, 280. *See also* R. 232, 236. She later described the man as the same height as herself, 5'6", R. 238, heavy-set, very clean-shaven, black, approximately 200 pounds, with a fat face. R. 237, 239. At trial, she was sure the shirt was a pullover, with a stripe around the neck and waist. R. 226-27. Mr. Arnold confirmed part of her identification, remembering a heavy set man wearing a knit shirt of dull, light color with a ring around the neck, R. 443, and that the assailant was clean shaven. R. 476, 498.[2] But he testified that the gunman was almost his height, about 6 feet two inches tall. R. 496-97.

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[2] In fact, in excluding one of the photographs in the photo show-up, described below, Mr. Arnold eliminated one photo *because* the person had a moustache. R. 464.

In contrast to these descriptions, petitioner was five feet, ten or eleven inches tall and weighed approximately 170 to 175 pounds. R. 596. Moreover, one of the state's witnesses — a motorist who had stopped at the scene of the auto accident that, according to the prosecution's theory, occurred when petitioner was fleeing the scene of the crime — testified that petitioner was wearing a white shirt that buttoned down the front and that he had a gray moustache. R. 311, 313, 318-20.

The substantial discrepancies between Mr. Darden's actual appearance and Mrs. Turman's and Mr. Arnold's descriptions of their assailant are not surprising in light of the conditions that surrounded their initial identifications of Mr. Darden. Three days after the incident, two sheriff's deputies visited Mr. Arnold in the hospital, where he was recovering from his bullet wounds. R. 446, 460-61. According to Mr. Arnold's testimony, elicited out of the presence of the jury, he had by this time already read newspaper stories about the crime, R. 457-58, and he probably knew of the arrest of a suspect. R. 462.

The deputies, Mr. Arnold recalled, had shown him six photographs and asked whether he could identify his assailant from among them. R. 446, 459-60. He immediately rejected four out of hand; "they didn't look anything at all like him." R. 449, 461-64. He then wrote on a piece of paper the following information:

> "Both of these two look a little like him!"
>
> DID HE HAVE A MUSTACHE?
>
> "I don't think so!"
>
> WHAT TYPE SHIRT WAS HE WEARING?
>
> "It was short sleeve. It was something like a red or orange and I think it was a knit material, pale."

R. 455, 475. Mr. Arnold then picked out of the two remaining photographs the one that looked "a little like him." This picture bore the name "Darden" and the date of arrest, "9-9-73."

The circumstances surrounding Mrs. Turman's identification were as follows. The day following her husband's funeral,

she was asked by the prosecutor to attend Mr. Darden's preliminary hearing. She was taken to a tiny courtroom with one black male sitting at defense table and no other blacks in the room. R. 221-22. The prosecutor walked over to Mr. Darden, pointed at him, and asked: "Is this the man that did it?" A.R. 50. She said yes. *Id.* Asked by the court whether she was sure that the man at the defense table was the assailant, she replied that "even with his back to me while I sat [at the rear of the courtroom] I reached over and touched my sister's hand and said, 'That's him.' " A.R. 53.

The only physical characteristic which every witness who saw both men could agree on was race: they were both "colored." The testimony of Officer Neill, who arrested Mr. Darden in Tampa, is particularly telling. Neill was asked if the man he arrested, Mr. Darden, fit the physical description given by Mrs. Turman. Neill replied: "Yes. The dark-colored automobile, the time element, the car crash . . . just lead me to believe this possibly was him." Pretrial hearing of 1/9/73 at 82. This "physical description" would have fit almost any black man near the scene of the crime that day. Indeed, the reliance on race as substantiating the identifications was something the prosecutor would return to in his summation.

### B. Exclusion Of Death-Scrupled Jurors

At voir dire, several jurors with scruples against the death penalty were excluded for cause upon the motion of the prosecutor. One of those excluded was potential juror Murphy. He was excluded solely upon the following question and answer:

> THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?
>
> MR. MURPHY: Yes, I have. (J.A. 9).

R. 165. This was the only question asked Mr. Murphy.

### C. The Interjection Of Race At The Voir Dire

During the voir dire, the prosecutor addressed the potential jurors as follows:

> The testimony is going to show I think very shortly when the trial starts the victims in this case were white and, of course, Mr. Darden, the defendant, is black. *Can each of you tell me that you can try Mr. Darden as if he was white?* Can you look at this defendant and assure me that you can try him as if he is white? Because the victims will be white. Can you look at the defendant and even though he is black, can you try him as if he was white?

R. 57, 115 (emphasis added). (J.A. 8-9).

Apart from the effect of reenforcing for the jury the different racial status of the defendant and the victims, the question presupposes disparate treatment for blacks and suggests that it requires a particular effort to treat a black defendant within the same standards of due process and impartiality due a white person. Even this would not be so disturbing had the prosecutor stopped there. But, as we shall see, his closing argument served forcefully to underline the negative implications of this voir dire questioning.

### D. The Closing Arguments

Petitioner's counsel opened and closed the arguments prior to deliberation on guilt or innocence. Mr. Maloney, the less experienced of the two,[3] began. He conceded that the perpetrator of the murder and assaults was "a vicious animal." R. 717. He also expressed his personal opinion regarding the strength of the circumstantial evidence regarding the pistol: "It's not good enough for me. I wouldn't do what you're being asked to do on that, really I wouldn't. . . ." R. 734. Finally, he expressed his personal opinion regarding the state's failure to prove guilt beyond a reasonable doubt, R. 736, and concluded: "The question is, do they have enough evidence to kill that

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[3] At the time, Mr. Maloney had been licensed as an attorney for only four months.

man, enough evidence? And I honestly do not think they do." R. 737-38.

Apart from these isolated errors committed by a fledgling lawyer, the defense summation was unexceptionable. Mr. Maloney recounted the state's evidence, stressed the virtual absence of any forensic evidence tying to the crime either Mr. Darden, his car, or even the weapon found a day and one-half later near the site of the wreck. He stressed the lack of any evidence tying the gun, despite its unique marking[4] and non-standard characteristics[5] to Mr. Darden. Finally, he noted the discrepancies between the descriptions of the assailant given by Mrs. Turman and Mr. Arnold, on one hand, and that given by the passer-by who assisted Mr. Darden after the wreck: The victims agreed that their assailant was clean-shaven and wore a dark or dull-colored pullover with a band or ring at the neck; the passer-by described Mr. Darden as having a moustache and wearing a white shirt with buttons down the front.

The prosecution's argument was split between Mr. White and Mr. McDaniel. Mr. White argued first, marshalling the state's evidence, enumerating the elements of the offenses, and discussing the reliability of the identifications. R. 738-747. He concluded:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murder, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life.

R. 748. (J.A. 15).

At that point, the senior prosecutor, Mr. McDaniel, rose to complete the summation. It is only possible to understand the nature and effect of that argument by viewing it as a whole, rather than a disaggregated series of individually improper

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[4] The gun was marked "United States Property, Massachusetts, December 29, .38 special BRD." R. 809.

[5] The gun had been rebored. *See* R. 778.

comments. Following on the heels of trial and arguments focusing on the reliability of the eyewitness identifications in the light of the weakness of the balance of the prosecution's case, McDaniel's argument was carefully crafted to make up for any deficiencies in the state's proof by distracting the jury from the evidence. From start to finish, McDaniel interjected and emphasized the emotional, the irrelevant, and the impermissible.

First, he disclaimed emotional involvement in the case. R. 749. (J.A. 15). Then he took credit for the tactical choice of defense counsel in focusing on the failures of the Polk County Sheriff in investigating the case: "he has notes I gave him many years ago." *Id.* Having thus established his authority and credibility, he launched on his first theme:

> But let me tell you something. As far as I am concerned, there should be another defendant in this courtroom, one more, and that is the division of corrections, the prisons. As far as I am concerned . . . this animal was on the public for one reason. Because the division of corrections turned him loose, lets him out, lets him out on the public. Can we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?
>
> * * *
>
> He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash. . . .
>
> No, I wish that person or persons responsible for him being on the public was in the doorway instead of Mr. Turman. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of the boy [Phillip Arnold].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them. Turn them loose to visit his family . . . that turns out his family is a girl friend in Tampa, . . . his sponsor.

R. 749-51. (J.A. 15-16).

Having sounded his theme—"Mr. Turman is dead because that unknown defendant we don't have in the courtroom allowed it. He is criminally negligent for allowing it." R. 752—(J.A. 17). McDaniel turned to his main point.

> The Court will tell you at the end of the argument in the jury instructions at this point, you are merely to determine his innocence or guilt, nothing else whether he is guilty or innocent. And after you return that verdict of guilty of first degree murder . . . then you will be asked at that time to go back and retire and advise the Court whether or not he gets the death sentence or whether he should get life.
>
> That is an advisory opinion on your part, and it has nothing to do with this trial, and Mr. Maloney knows that. But . . . I will guarantee you I will ask for the death. There is no question about it.
>
> The second part of the trial I will request that you impose the death penalty. I will ask you to advise the Court to give him death. That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way that anybody can be sure of it now, because the people that turned him loose—this man served his time and if this man served his time as the Court has sentenced him, that's fine. If he's rehabilitated, fine. But let him go home on furloughs, weekend passes—not home, strike that, excuse me—go over with his girl friend for the weekend, go shoot pool for the weekend, go sell his guns, or gun, for the weekend, go consume drink in the bars over the weekend.

R. 752-54. (J.A. 17-18).

McDaniel then sounded his second theme:

> Mr. Maloney said, well, sure he had an accident, . . . b' do you think he would admit that accident if he wouldn't have had that fancy fingerprint [6] to prove it? No, he wouldn't have admitted nothing.

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[6] There was no fingerprint evidence introduced in this case, whatsoever.

> I don't know, he [Darden] said on final argument I wouldn't lie, as God is my witness, as God is my witness, I wouldn't lie. Well let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out.

R. 754. (J.A. 18).

McDaniel turned briefly to the reliability of the eyewitness testimony. R. 756-57. (J.A. 18-19). He then focused on the events of the crime, R. 757, which he punctuated with the following observations:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [Darden] sitting here with no face, blown away by a shotgun, but he didn't. . . . I wish someone had walked in the back door and blown his head off at that point. But he is lucky, the public unlucky, people are unlucky, it didn't happen.

R. 758-59. (J.A. 20).

> But he [Darden] heard every word everybody said, and I assure you, if we hadn't been able to prove the accident, they would never have admitted it.

R. 764. (J.A. 23).

> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough Sheriff's Office, but he and his keepers, the Division of Corrections.

R. 764-65. (J.A. 23).

> But sometimes, it emotionally gets to me. For four days I saw that man sitting there—calm, cool, calculating, smiling at the right time, until it came up time for his parole was in question, and then he goes to the stand with his handkerchief in his hand. . . .
>
> I don't cry for him. . . .

R. 765. (J.A. 23).

> He's even got a driver's license. Why in the world does—what in the world is a State prisoner doing with driver's license? I wonder if the public is paying for it.

R. 766. (J.A. 24).

> Lie detector test. That's the red herring they would like to throw in. I don't believe anything he says. . . .

R. 769-70. (J.A. 26).

McDaniel returned to the evidence, discussing the accident and eyewitness testimony again. R. 770-75. He then discussed the gun and the shooting, noting that four shots were fired. R. 773-75. "And Mr. Darden saved one. Again, I wish he had used it on himself." R. 775. (J.A. 28). Of the accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." R. 775. (J.A. 29).

McDaniel's peroration did not let up.

> He stopped at one service station, he says, to get a wrecker in Plant City. That's what he says, I don't know that he stopped at any. What was he going to do with the wrecker when he got it? I guarantee you he was not going back to the scene of the accident until he had gotten home.

R. 777-78. (J.A. 30).

> [D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat.

R. 779. (J.A. 31).

And then he closed:

> I'm going to ask you, in closing, that you consider the direct evidence, and as Mr. Maloney said, its good evidence, the best evidence, the direct evidence, the eyewitness considered as circumstantial evidence, surrounding that wreck, the time, the place, *his color*, clothes, the gun, where he went, leaving the scene of an accident and don't turn this man loose. I cannot help but wish that the Division of Corrections was sitting in the chair with him. Thank you (emphasis added).

R. 780-81. (J.A. 32).

There were two objections during the course of McDaniel's summation. The first occurred immediately after McDaniel

referred to the defendant as "a criminal" and alleged that he had carried a gun when he returned home on furlough. R. 751. This was objected to as not based on the evidence. The judge merely deflected the issue, reminding the jury that they "are the judges of the evidence." *Id.* (J.A. 16-17).

The second occurred later in the argument, "that's about the fifth time that he has commented he wished someone would shoot this man or that he would kill himself." R. 779. This degenerated into an exchange between Mr. Maloney and Mr. McDaniel about which side had less evidence. R. 779-80. The court's response was to overrule the objection and order counsel to proceed. R. 780. (J.A. 31).

The judge's instructions to the jury prior to the summations tended to make matters worse. He told the jurors that:

> I am sure that none of the attorneys would intentionally misquote any evidence or mislead you in any way. They are all respected attorneys back in Polk County; they are all personal friends, I think, of mine; and I know each of them well. . . . [T]hey are permitted to argue the law to you. They are certainly permitted to argue the facts to you; so both will be involved. But they are not binding upon you.
>
> Now, let me tell you what they are. They are a big help to you, or can be. These are men who are trained in the law or trained in trials, and their analysis of the testimony, their analysis of the issues, their comments upon the pertinence and the weight of the particular items of testimony can be extremely helpful to you. . . .

R. 713-14.

Faced with this, Mr. Darden's senior counsel, Mr. Goodwill, did the best he could to respond. Referring to White's and McDaniel's improper arguments, he noted particularly and "more importantly, the way they were said, the manner in which they were expressed . . . ," R. 782, "the yelling and screaming and righteous indignation and get up and blow your face off," R. 801; "the yelling and screaming and the pushing and the shoving and the hitting with the stick, and the whole works." R. 802. And he admonished the jury: "He tries to win

you or embarass you into a decision based on his argument, but not based on what came from that stand. . . ." *Id. See also* R. 786, 787, 791, 794, and 804. Instead, he discussed the evidence and testimony at great length, R. 782-820, concluding: "You can't prove him guilty on what Mr. McDaniel says, and by the same token, you can't find him innocent on what I say." R. 818.

### E. The Performance Of Defense Counsel At Sentencing

The senior of the two assistant public defenders to represent petitioner, Raymond A. Goodwill, Esq., served as a public defender only part-time, two days per week. H.C. 273. Although he had tried three or four capital cases, H.C. 278-79, he had no experience in preparing a case for the separate, post-verdict sentencing trial provided by Florida's 1972 death sentencing statute. Co-counsel, Maloney, was just recently licensed to practice. *See* H.C. 132, 143. (J.A. 153). Ironically, the responsibilities of lead counsel fell largely upon him. (J.A. 154-189).

Counsel's preparation for the sentencing hearing consisted solely of "twenty or twenty-five minutes" of talking with the victim's widow during a "thirty or forty minute recess" between the announcement of the guilt verdict and the commencement of the sentencing proceeding. H.C. 373. Counsel waived opening argument to the jury, R. 893, offered no evidence, R. 892, and made only a brief, three or four-minute summation. R. 895-97. Maloney, the less experienced counsel did the summation; he began by telling the jury that he was "sure that you will find that Mr. Darden falls into just about every one of the *aggravating* circumstances. . . ." R. 895 (emphasis added).

Once counsel had completed this "presentation," the court, in the presence of the jury, invited Mr. Darden to speak. Speaking from the counsel table, Mr. Darden said:

> Ladies and gentlemen of the Jury, I was on the stand yesterday for some period of time giving my testimony[,] the best of my knowledge of what happened on that Saturday. I stand firm before you again today after being con-

> victed, that what I told you on that stand was the truth. You have found an innocent man guilty of murder, something I has no knowledge about. You not only damaged me, you damaged my family, seven kids and a wife. That's all, Your Honor.

R. 897-98. The jury returned a recommendation of death, but only by a divided vote. *See Darden* v. *Wainwright*, 699 F.2d 1031, 1041 (11th Cir. 1983) (Clark, C.J. dissenting). (J.A. 269). The trial court imposed the death sentence, finding only two mitigating circumstances: that petitioner "is the father of seven children" and that he "repeatedly professed his complete innocence of the charge." A.R. 208. (J.A. 35).

Defense counsel knew at trial of information relevant to Mr. Darden's character and background. H.C. 885. For example, counsel received psychiatric and psychological evaluations containing mitigating material. The psychiatric report stated that petitioner

> could be called a [Schizoid-] personality, a man who has been socio- and economically deprived throughout his life. He had never known as a child, any mothering, as his Mother died at an early age and he was cared for by whatever relatives were available.

A.R. 27. A second psychiatric report contained a fuller treatment of the circumstances of Mr. Darden's life from childhood. It indicated that he ran several businesses successfully, was well liked in the community, and was considered non-violent by his acquaintances. His intellectual functioning was evaluated as dull normal, with an I.Q. of 88. Report to Judge Dewell from H. Goldsmith, Ph.D. (January 14, 1974); *see* A.R. 151. In addition, petitioner's girlfriend would have testified that he was good, kind, and non-violent to her and others.

Preparation by counsel would have yielded more.[7] Mr. Darden was born in Greene County, North Carolina in 1933. His mother, the daughter of tenant farmers, was fifteen-years-old.

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[7] The information that follows is contained in the record of petitioner's second habeas corpus proceeding which is before the Court.

His father was an auto mechanic with a third grade education. His mother died in childbirth, two years later, along with his infant brother. Both of his parents, like most black residents of that area were but two generations removed from slavery.

Greene County is an impoverished rural area of Eastern North Carolina with a 50% black population. It is primarily an agricultural community; tobacco is the basis of the local economy. When Mr. Darden was born, the local tobacco farmers still depended exclusively on the labor of their black tenants. These blacks were free only of the legal status of slavery; their lives were entirely dependent on the marginal existence available through seasonal labor in the tobacco fields. More than 70% of the farms in the county were worked by black tenants (affidavit of William C. Harris) yet by the 1930's, blacks owned only 4% of the taxable wealth in the state. The average black family earned less than $1,000 annually. The schools available to blacks held classes only during those brief respites from the seasonal tobacco industry. The high-school graduation rate for blacks during that period was four times less than that for whites. The average formal education for black adults in rural areas like Greene County was 2½ years. The infant mortality rate in Wilson, North Carolina, the closest city to the rural area in which Mr. Darden was raised, was 136 per 1,000, fourth highest of any city in the United States. The rate among the black population was twice that of the white population.

As recounted by historian William C. Harris, the black residents of Greene County were "commonly referred too as 'niggers.' When they were brought to court, they usually found themselves at the mercy of a hostile or indifferent white judge and jury . . . black offenders were more severely penalized than the crimes warranted. . . . Most of their crimes were minor theft, frequently committed in order to survive." Mr. Darden's earlier experience with the criminal justice system consisted of a series of economic crimes committed in an attempt to support himself and his family in an environment totally lacking in economic opportunity for the average black. One early episode resulted in a four year prison sentence for

forging a check for forty-eight dollars in order to buy food for his pregnant wife and himself.

Life in Greene County was an ordeal for blacks from which few escaped unscathed. "Willie, along with his contemporaries born in the 1930's, faced a life of marginal existence in which there was little work for much of the year, no hope that he could improve his social standing, and almost non-existent opportunity to acquire a high school education and advance into a career." (Harris affidavit).

Mr. Darden's early life was spent in several different homes. After his mother died when he was two, he was sent to live with his maternal grandparents. He returned home when his father remarried in 1938, but he was sent to a foster home when his stepmother abandoned the family. These tenant farmers prevented him from attending school, made him perform excessive farm chores, and failed to provide him clothing. He eventually stole in order to dress properly.

After several months with the foster family, Willie Darden was involved in several episodes of petty theivery. He was eventually caught attempting to pilfer a mailbox, for which he was sent to the National School for Boys at the age of sixteen. Once there, he adamantly refused to return to this foster family.

The authorities at the School for Boys described him at the time as a simple, well-intentioned and cooperative youth who seemed inordinately obsessed with his father and extremely concerned that he had not heard from him since he was abandoned to the foster home. An evaluation conducted at the time states that Willie was very "anxious to reestablish the relationship . . . between himself and his father," and that he constantly "describes his father in glowing terms and actually embroidered on fact when giving his history in order to present the father in the most favorable light." It is clear that the unexplained abandonment by his father crushed Willie emotionally and was a radical turning point in his transition from adolescence to adulthood.

Those who knew Willie Darden describe him as a kind, wise, and non-violent man, and express a unanimous disbelief that he could be capable of committing the crime with which he was charged. His former wife recalls him as a good man who never argued or fought with anyone. His son remembers their loving relationship and describes him as "the most amazing and inspirational man I have ever met."

Counsel were aware of none of this. The reason is clear: They believed they "were fairly limited statutorily by what things were in the statutes as far as mitigation." H.C. 372. As Maloney testified:

> . . . after a perusal of the mitigating circumstances in the Florida Statute 921.141[,] . . . we reached the conclusion that Mr. Darden did not qualify for any of the mitigating circumstances.
>
> We were operating on the premise at that time that we were limited to those mitigating circumstances. At least I was completely unaware that any mitigating circumstance, if relevant, is admissible.
>
> Something should have been offered in mitigation. In any capital case such as this, something can be offered in mitigation.

Q. Would it be fair to say that you and co-counsel were using 921.141—I believe it's subsection B, Mitigating Circumstances—as being a closed shop? That that was all you could consider in the way of mitigating circumstances and nothing outside the four corners of the statute?

A. Until the Supreme Court ruled in *Gardner* v. *Florida*, that was my opinion. And *Gardner* v. *Florida* considerably postdated this trial.

Q. Okay. But that was what you were all thinking on the day—

A. Yes, sir.

Q. —on January 19th, 1974.

A. Yes, sir.

* * * *

A. We certainly went through the mitigating circumstances in 921.141, and I believe we came to the conclusion that there were no mitigating circumstances and no evidence was presented.

H.C. 154-55; (J.A. 162-163) *see also* H.C. 245-46. Maloney later learned he was wrong: "*Lockett* is the first time that I found out from the United States Supreme Court that mitigating circumstances were not limited to the enumerated mitigating circumstances." H.C. 178. (J.A. 177).

## II. COURSE OF PROCEEDINGS

The history of this case is tortuous. On direct appeal, the Florida Supreme Court treated the prosecutorial argument issue on the merits.[5] It conceded the argument was improper but nevertheless affirmed because "[t]he law requires a new trial only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt . . . or in which the comment is unfair." *Darden* v. *State*, 329 So.2d 287, 289 (Fla. 1976). It found no unfairness here for three reasons: (1) in light of the defense argument, "the statements of prosecuting counsel . . . do not seem unduly inflammatory . . .," 329 So.2d at 290; (2) in light of the "heinous set of crimes . . ." the arguments were "fair comment . . . reasonably describing what happened and what should be done to the guilty party . . .," *id.* at 290-91; and (3) in light of "overwhelming eyewitness and circumstantial evidence" and "absolutely no mitigating circumstances," the remarks, "were not sufficient to deprive Appellant of a fair trial. . . ." *Id.* at 291. Two justices dissented. (J.A. 44-60).

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[5] The court of appeals concluded that the "suggestion the Florida Supreme Court did not dispose of the issue on the merits is untenable." *Darden*, 699 F.2d at 1034, *aff'g*, 513 F. Supp. at 951-52. (J.A. 272).

In his brief before the Florida Supreme Court (pp. 28-35), Mr. Darden challenged the exclusion for cause of venireman Murphy. The argument was rejected by that court without discussion. *Id.* at 289.

This Court granted certiorari, heard argument, and dismissed the writ as improvidently granted. *Darden* v. *Florida*, *cert granted*, 429 U.S. 917 (1976), *cert. dismissed*, 430 U.S. 704 (1977).[9] On federal habeas corpus, the Magistrate recommended that the writ be granted on the grounds of prosecutorial misconduct. The Magistrate also recommended that relief be granted due to the unconstitutional exclusion for cause of venireman Murphy. (J.A. 190) The district court disagreed on both issues and denied relief. *Darden* v. *Wainwright*, 513 F.Supp. 947 (M.D. Fla. 1981). (J.A. 233) A panel of the Eleventh Circuit affirmed, one judge dissenting. *Darden*, 699 F.2d 1031 (11th Cir. 1983). (J.A. 260). Rehearing en banc was granted, and the district court was affirmed by an equally divided court. *Darden*, 708 F.2d 646 (11th Cir. 1983). (J.A. 295) On second rehearing, the en banc court reversed, granting relief on the *Witherspoon* claim. 725 F.2d 1526 (11th Cir. 1985). (J.A. 299).

This Court vacated and remanded for reconsideration in light of *Wainwright* v. *Witt*, ___ U.S. ___, 83 L.Ed.2d 841 (1985). (J.A. 375) On remand, the en banc court denied relief, two judges dissenting. *Darden*, 767 F.2d 752 (11th Cir. 1985). (J.A. 376).

## SUMMARY OF ARGUMENT

The closing arguments made by the prosecutors in this case have been condemned by virtually every judge who has looked at them. They have never been defended by the state as proper. These arguments flouted every rule of professional

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[9] The Court initially granted certiorari upon a petition that included the *Witherspoon* claim, *see Darden* v. *Florida*, 45 U.S.L.W. 3356 (Nov. 9, 1976), but subsequently limited the grant of certiorari to the issue of prejudicial prosecutorial summation. 429 U.S. 1036 (1977). (J.A. 61-62).

conduct recognized by the organized Bar. They were calculated to divert the jury's attention from the central factual issues in the case, especially the issue whether the prosecution's problematic identification evidence was sufficiently persausive to convict Mr. Darden. Crafted to evoke passion and inflame prejudice, these arguments violated Mr. Darden's most basic rights: to a fundamentally fair and reliable determination of his guilt or innocence and of the appropriate sentence.

"The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close scrutiny." *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976). Because the prosecution's improper arguments were designed and likely to affect the reliability of the factfinding process, they introduced more than a probability of actual prejudice. In such a case, the state should be required to demonstrate beyond a reasonable doubt that the arguments were harmless, *Chapman* v. *California*, 386 U.S. 18 (1967),—if it asserts that they were. Here, the state has shown nothing of the sort. To the contrary, it appears only too likely that the prosecutor's arguments achieved the result they plainly sought: to tip the scales in favor of a verdict of guilt. Nor, on this record, can the arguments that strove improperly to emotionalize the determination to impose the death sentence be said to have had no effect. *Caldwell* v. *Mississippi*, 472 U.S. ____, 86 L.Ed.2d 231, 247 (1985). Accordingly, both the conviction and the sentence must be reversed.

Reversal of the death sentence is required on two other grounds: First, prospective juror Murphy was excluded solely on the basis of a single question and answer that disclosed strong scruples against the death penalty. This question, however, failed to inquire—and the answer, therefore, failed to establish—whether those scruples were so strong that they would substantially impair Mr. Murphy's performance as a fair and impartial juror or whether Mr. Murphy would be able to subordinate those scruples to the law. *Wainwright* v. *Witt*, 469 U.S. ____, 83 L.Ed.2d 841 (1985). Because his exclusion for

cause was the result of a purely legal error, reversal is required on the face of the record.

Second, Mr. Darden was deprived of the effective assistance of counsel at the sentencing stage. In effect, he was left to face the jury alone: He made a short statement in mitigation at the urging of the trial judge, but no other mitigating evidence was presented. This was because counsel failed entirely to investigate or prepare for the sentencing hearing until twenty minutes before it began. Had they done so, they could have presented relevant, available information concerning Mr. Darden's background and character. This mitigating information would have counteracted much of the prosecutor's improper and unsupported assertions and arguments. Because of counsel's failure, Mr. Darden's sentencing hearing was less an adversary proceeding than the sacrifice of an unaided and unshielded prisoner to the prosecutorial gladiator.

## ARGUMENT

### I. THE PROSECUTION'S CALCULATED, UNPROFESSIONAL AND INFLAMMATORY CLOSING ARGUMENT ROBBED THE DETERMINATION OF PETITIONER'S GUILT OF THE FUNDAMENTAL FAIRNESS REQUIRED BY DUE PROCESS AND DEPRIVED THE DETERMINATION OF SENTENCE OF THE RELIABILITY REQUIRED BY THE EIGHTH AMENDMENT.

There is no dispute about the nature of the prosecution's conduct; it has received universal condemnation. The federal district court observed that: "Anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility, Canon 7, EC 7-24, and DR 7-106(c)(4) could not possibly improve upon th[is] example." 513 F.Supp. at 955. (J.A. 246) The Florida Supreme Court acknowledged that "under ordinary circumstances [it] would constitute a violation of the Code of Professional Responsibility." 329 So.2d at 290. (J.A. 48) The majority of the court of appeals acknowledged that the argument "can only be described as tasteless and unprofessional . . .," 699 F.2d at 1036, (J.A. 277) noting that it "contained

personal opinions" in violation of the Code and that "the prosecutor's comments would have been reversible error in an appeal from a federal case." *Id.* at 1035-36. (J.A. 278) The district court described the argument as "a series of utterly tasteless and repulsive remarks . . .," "pointless," 513 F.Supp. at 955, and a "tirade." *Id.* at 953. (J.A. 247, 248, 243) The dissenting justices in the Florida Supreme Court noted that the "remarks of the prosecutor in the case at bar can only be characterized as vituperative personal attacks upon the appellant and as appeals to passion and prejudice." 329 So.2d at 293. (J.A. 56). The federal magistrate referred to the "numerous instances of prejudicial prosecutorial argument" as "improper, repeated, prejudicial." Magistrate's Report at 22. Even the state concedes: "No one has ever even weakly suggested that McDaniel's closing remarks were anything but improper. . . ." 513 F.Supp. at 952. (J.A. 240-241)

We show below that this extreme misconduct deprived petitioner of fundamental fairness in the determination of his guilt or innocence and of reliability in the determination of his sentence. That being so, the ensuing prejudice is palpable. If a defendant is convicted and sentenced to death as a result of proceedings that are fundamentally unfair and unreliable, prejudice is presumed; the burden is properly cast on the state to show that there was none. But even if petitioner bore the burden, the circumstances and extent of *this* misconduct in the context of *this* case demonstrate prejudice.

In the sections that follow, we first discuss the standards that control analysis under the due process clause. We then consider the claim as to sentence in light of the eighth amendment standards repeatedly reaffirmed by this Court. Finally, we assess the prejudice to Mr. Darden on the unique facts of this case.

### A. Mr. Darden Was Denied Fundamental Fairness In The Determination Of His Guilt Or Innocence

"[N]ot every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe the fundamental fairness essential to the very concept of justice.'" *Donnelly* v. *De Christoforo*, 416

U.S. 637, 642 (1974) (quoting *Lisenba* v. *California*, 314 U.S. 219, 236 (1941)). But some do.

> The relevant question . . . inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

*Adamson* v. *California*, 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring).

The Court is not left at large in this inquiry.

> [S]tate criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and this country.
>
> The question thus is whether given this kind of system a particular [rule] is fundamental—whether, that is, [it] is necessary to an Anglo-American regime of ordered liberty."

*Duncan* v. *Louisiana*, 391 U.S. 145, 149-50 (1968); *accord Johnson* v. *Louisiana*, 406 U.S. 356, 372 n.9 (1972) (Powell, Jr., concurring) ("the focus is, as it should be, on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States."). The "better guide . . . is disclosed by 'the existing laws and practices in the Nation.' " *Baldwin* v. *New York*, 399 U.S. 66, 70 (1970) (quoting *Duncan*, 391 U.S. at 161).

On this score, there is no doubt. The calculated, inflammatory argument of the prosecution in this case did more than draw the universal condemnation of the courts below. It violated the specific prohibitions embodied in the law of every state and the District of Columbia, for each state has adopted either the Code of Professional Responsibility or the new ABA Model Rules of Professional Conduct (1983). The Code provides that:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case . . .
>
> (2) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
>
> (3) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, . . . or as to the guilt or innocence of an accused . . .

DR 7-106(C). These prohibitions have been carried forward without charge in the Model Rules, Rule 3.4(e). The ABA Standards for Criminal Justice (2d ed. 1980) provide:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it might draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
>
> (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

*Id.* § 3-5.8.[10]

The prosecutor in this case flouted each and every one of these proscriptions: He interjected irrelevant issues such as

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[10] Identical restrictions apply on the conduct of the defense. *Id.*, § 4-7.8.

the culpability of the prison system; he asserted personal opinions and beliefs regarding the veracity of facts stated by Mr. Darden in his sworn testimony and not rebutted by any evidence in the case; he expressed a personal opinion of Mr. Darden's guilt and repeatedly asserted his personal opinion that Mr. Darden was lying. Moreover, his entire argument was calculated to inject into the trial issues broader than guilt or innocence: the appropriateness of the death penalty (which he argued extensively at the guilt/innocence stage after expressly acknowledging that it was not an issue at that stage); the public misforture that Mr. Darden had not yet been killed by a shotgun, automobile accident, or suicide; the culpability of the prison system; Mr. Darden's culpability for having a driver's license and a girlfriend; and the need to execute Mr. Darden to insure that he did not get out and commit other crimes. McDaniel repeatedly and shrewdly appealed to the passions and prejudices of the jury. All of this served only to divert the jury from what it should have focused on at the guilt/innocence stage: the evidence, and whether Mr. Darden was in fact the guilty man.

The Code, the Model Rules, and the ABA Standards are not, even by dint of the universality of the consensus they express, *ipso facto* incorporated into the due process clause. But, as has been expressed elsewhere at greater length,[11] neither are they the expression of a mere ethical nicety. Rather, as explained in the ethical considerations accompanying the rule,[12] they serve as a necessary concommitant to the principle that: "In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion

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[11] Brief of a Group of American Law School Teachers of Professional Responsibility *Amici Curiae* in Support of the Petition for Certiorari in *Tucker* v. *Kemp*, No. 85-5496, filed October 28, 1984.

[12] Although "[t]he ethical considerations are aspirational in character. . . ," Code of Professional Responsibility, Preamble and Preliminary Statement at 1, they also express "the reasons underlying these standards." *Id.* at n.7.

of all other considerations." EC 7-24. "Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law . . .; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider." EC 7-25.

These concerns mirror directly the concerns of the due process clause. "Court proceedings are held for the solemn purposes of endeavoring to ascertain the truth which is the sine qua non of a fair trial." *Estes* v. *Texas*, 381 U.S. 532, 540 (1965). "This Court has declared that one accused of crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . other circumstances not addressed as proof at trial." *Taylor* v. *Kentucky*, 436 U.S. 478, 487 (1978); *accord Estelle* v. *Williams*, 425 U.S. 501, 503 (1976).

The constitutional vice of the arguments exhibited here is precisely the same as the ethical one: "the focus of the trial, and the attention for the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern of a criminal proceeding." *Stone* v. *Powell*, 428 U.S. 465, 489-90 (1976). Arguments that inject passion and prejudice, inflame the jury, invoke prosecutorial position and expertise to preempt determination of the credibility of witnesses and the truthfulness of evidence "deflect[] the truthfinding process . . ." *Id.* at 490.[13] Similarly, arguments about the mistakes of the prison system or the parole board,

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[13] In *Harris* v. *State*, 414 So. 2d 557 (Fla. 3d DCA 1982), a case much like this one, an eyewitness identified the defendant as twice having robbed a laundromat. The defendant testified that he had not been in the laundromat on either date. The prosecutor made references to the rampage of crime in the community and expressed his personal belief in the defendant's guilt. The District Court of Appeals reversed the conviction. "It is the responsibility of the prosecutor to seek justice, not merely to convict. That responsibility will be more nearly met when the jury is permitted to reach a verdict on the merits without counsel indulging in appeals to sympathy, bias, passion, or prejudice." *Id.* at 558.

the appropriateness of the death penalty, and the defendant's purported future dangerousness have no place at the guilt/innocence stage; "it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden or proving beyond a reasonable doubt that the defendant is guilty . . ." *Beck* v. *Alabama*, 447 U.S. 625, 642 (1980).

The universal consensus of the organized Bar, adopted as the law of each of the fifty states and the District of Columbia, shows that prosecutorial misconduct of these kinds threatens the "just and informed decisions" necessary to our system of truthfinding. *See* EC 7-24. That consensus is persuasive evidence of the meaning of due process in our system.

This conclusion is buttressed by the decisions of this Court. In *Donnelly* v. *De Christoforo*, the Court phrased the inquiry as whether "a prosecutor's remark . . . so infected the trial with unfairness as to make the resulting conviction a denial of due process." 416 U.S. at 643. On the basis of "an examination of the entire proceedings . . .," *id.*, the Court concluded that it did not. It premised that conclusion on three factors.[14] First, the remark in *Donnelly* was "an ambiguous one. . . ." *Id.*, at 645. Second, it "was but one moment in an extended trial . . . ." *Id.* Third, it "was followed by specific disapproving instructions." *Id.*

"Here, in contrast, the prosecutor's remarks were quite focused, unambiguous, and strong." *Caldwell* v. *Mississippi*, 472 U.S. ____, 86 L.Ed.2d 231, 246 (1985). They were woven throughout the whole fabric of the prosecutor's summation. Unlike *Donnelly*, there was no curative instruction.[15] Al-

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[14] The *Donnelly* Court first distinguished the case in "which the prosecutor's remarks so prejudiced a specific right . . . as to amount to a denial of that right . . . ," 416 U.S. at 643, in determining to apply the more general standard of due process. *Id.*

[15] There were instructions to the jury that it should consider only the evidence. *See* R. 824, 862, & 864. And there had been a warning *before* the summation that arguments are not evidence. But there

though he trial judge in Mr. Darden's case did not go quite as far in endorsing the improper comment as did the judge in *Caldwell*, 86 L.Ed.2d at 243, he came close. He both endorsed the lawyers' summations generally beforehand[16] and brushed aside or overruled the objections to the prosecutor's argument, thus effectively indicating "to the jury that the remarks were proper. . . ." *See Caldwell*, 86 L.Ed.2d at 243.

In *Donnelly*, the Court also noted that "closing arguments . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." 416 U.S. at 646-47.[17] Here, in contrast, the meaning was crystal clear. The offending comments were not limited to a single, isolated remark but rang out recurrent themes central to the summation.

Indeed, the very nature of these improper comments—invoking irrelevant issues designed to inflame the jury and motivate it to convict the defendant—point unerringly to the conclusion that the prosecutor employed "improper methods calculated to produce a wrongful conviction. . . ." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). There is no other explanation for the fact that McDaniel focused on the need for the death sentence in his arguments at the guilt/innocence stage of the trial. As the district court found: "It is apparent in reading

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was no curative instruction. There were no instructions after the summations either that the prosecutors had erred or that arguments are not evidence.

[16] The trial judge had admonished the jury before closing argument that it could rely on the expertise and experience of counsel and that, therefore, their views on the evidence would be very helpful. R. 713-14. The prosecutors took advantage of this and asked the jury to accept their personal beliefs of Mr. Darden's untruthfulness and guilt.

[17] The *Donnelly* Court acknowledged that "these general observations in no way justify prosecutorial misconduct," *id.* at 647, but instead merely served to show that it was not necessarily true that the jury had drawn the impermissible inference from the prosecutor's ambiguous remark. *Id.*

the arguments in their entirety . . . that the prosecutor had a dual purpose in mind when he attacked the Division of Corrections . . . , he was also making, in effect, his principal argument in support of the death penalty." *Darden*, 513 F. Supp at 953. (J.A. 243) "This conclusion is buttressed by the fact that, at the conclusion of the penalty phase of the trial, the prosecutor's argument to the jury is contained on a single page of transcript." *Id.* at 953 n.10. (J.A. 243-244) Yet, at the guilt/innocence stage, "the central issue" was whether Mr. Darden was the guilty man, "whether the state ha[d] satisfied its burden of proving beyond a reasonable doubt that the defendant [wa]s *guilty* of a capital crime." *Beck*, 447 U.S. at 642 (emphasis added).

Given that the prosecutorial arguments prohibited by the Code, the Model Rules, and the ABA Standards—and exhibited in this case—serve only to pervert and distort the truthfinding process, it is wholly inappropriate to require the defendant to prove that he was prejudiced by them. "Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. . . . Moreover, such circumstances involve impairments . . . that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland* v. *Washington*, ___ U.S. ___, 80 L.Ed.2d 674, 696 (1984). "When the prosecutor's conduct is considered to have transgressed the basic principles of fair play embodied in the due process clause . . . the standard is strict indeed." *Kyle* v. *United States*, 297 F.2d 507, 513 (2d Cir. 1961) (per Friendly, C.J.).[18] Such "constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it the burden to show that it was harmless." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

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[18] Judge Friendly noted that:

> The conclusion we draw . . . is that the standard of how serious the probable effect of an act or omission at a criminal trial must be in order to obtain the reversal . . . is in some degree a function of the gravity of the act or omission; the strictness of the application of the harmless error standard seems somewhat to vary,

This conclusion is corroborated by the Court's recent decision in *Caldwell*. The Court found that the specific comments at issue in that case "so affect[ed] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." 86 L.Ed.2d at 246. In reaching that conclusion, it observed: "Because we cannot say that this effort had *no effect* on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." *Id.* at 247 (emphasis added). By the same token, convictions obtained by such fundamentally unfair proceedings must be reversed: "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck*, 447 U.S. at 638 (quoting *Gardner* v. *Florida*, 430 U.S. 349, 358 (1978)) (footnote omitted).

### B. Mr. Darden Was Denied Reliability In The Determination His Of Sentence

The effect of McDaniel's impermissible arguments on sentencing must also be considered. For as the district court found, this *was* his argument on sentencing; the prosecutor made no other argument to speak of. 513 F.Supp. at 953 and n.10. (J.A. 243-244).

The effect of his argument was to inflame the jury, to evoke its passions and invoke its prejudices, and to lead it to impose the death penalty for impermissible reasons. McDaniel repeatedly wished that Mr. Darden had killed himself, slit his own throat, shot himself, or wrapped himself around the pole in the

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and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play.

297 F.2d at 514. On this basis, Judge Friendly concluded that for deliberate prosecutorial misconduct, as is true in Mr. Darden's case, the showing of prejudice required should be at its nadir and the harmless error rule should apply. *Id.* at 514-15.

automobile accident. He referred to him as an animal and as needing "a leash on him and a guard at the other end of that leash." R. 750. (J.A. 16) He asked the jury to strike a blow at the correctional system responsible for Mr. Darden's furlough and urged his personal opinion that *its* irresponsibility required the death sentence: "That's the only way that I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it." R. 753. (J.A. 17) He did not fail to invoke race, noting the description of the assailant as "the colored male . . . , R. 763, (J.A. 22) and closing with the "circumstantial evidence, surrounding that wreck, the time, the place, his color . . . ." R. 781. (J.A. 32).

In making these arguments, McDaniel violated each relevant provision of the Code and the ABA Standards. He argued matters that he had "no reasonable basis to believe . . . relevant" and that were "not . . . supported by admissible evidence." DR 7-106(C)(1). He asserted his personal knowledge of these "facts," which he had thus improperly put in issue. *Id.*, subsection (3). He asserted his personal opinion on the justness of the death sentence in this case. *Id.*, subsection (4). He used argument "calculated to inflame the passions or prejudices of the jury." ABA Standards § 3-5.8(c). And he "ma[de] predictions of the consequences of the jury's verdict" when that question was not open to consideration under the applicable sentencing law. *See id.*, subsection (d).

In violating these ethical proscriptions and in making these impermissible arguments, McDaniel deprived Mr. Darden of a trial that satisfied the "heightened 'need for reliability in the determination that death is the approprite punishment in a specific case . . . ,'" *Caldwell*, 86 L.Ed.2d at 246 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)), which has been a repeated concern of this Court. *See, e.g., California* v. *Ramos*, 463 U.S. 992, 998-99 (1983). A sentence of death obtained in this manner cannot be countenanced without disregarding the "vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358. The argu-

ments used in this case were (to invert Justice O'Connor's observation) "extraordinary measures to ensure that the prisoner to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was . . . imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

Under these decisions, an exacting scrutiny is demanded of the process by which death is imposed. As Judge Friendly noted in *Kyle:*

> [T]he pans contain weights and counterweights other than the interest in a perfect trial. Sometimes only a small showing of preducice, or none, is demanded because that interest is reinforced by the necessity that "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach," . . . and by the teaching of experience that mere admonitions are insufficient to prevent repetition of abuse.

297 F. 2d at 514 (quoting *People* v. *Savvides*, 1 N.Y. 2d 554, 154 N.Y.S. 2d 885, 136 N.E. 2d 853 (1956) (per Fuld, J.)). The Court recognized this point in its decision in *Caldwell* just last Term, and demanded that we be able to say that the improper argument "had no effect on the sentencing decision. . . ." 87 L.Ed.2d at 247. Especially in light of the persistence of unchecked prosecutorial misconduct of this sort, *see* Brief of a Group of American Law Teachers of Professional Responsibility as *Amici Curiae* in *Tucker* v. *Kemp*, No. 85-5496, at 10-12, it is clear that *Caldwell* struck the correct balance. Accordingly, this death sentence must be reversed.

### C. Although Mr. Darden Is Entitled To Relief Under The Harmless Error Doctrine, He Suffered Actual And Substantial Prejudice

The magistrate's assessment of the effect of McDaniel's argument is difficult to fault.

> The case against Darden was not a weak case, but it did depend on the jury's determination of the credibility of Darden's alibi testimony as against the eye-witness testi-

> mony of the victims.[19] All attacks upon Darden which would affect his credibility in the minds of the jurors or prejudice them against him would tend to discredit him and his testimony. Defense counsel's objection to the prosecutor's argument was late and tentative. The trial judge overruled the objection thereby making it appear that the argument could be properly considered by the jury.
>
> The question which then must be asked is: In the context of the entire trial did the prosecutor's improper arguments either have a substantial influence on the jury's determination of guilt, or is there grave doubt what influence the argument did have on the jury?

Magistrate's Report at 22. (J.A. 214).

Having articulated the proper standard under *Donnelly* and closely presaged this Court's later formulation in *Caldwell*, the magistrate then considered the trial as a whole.

> Petitioner's trial counsel put in issue the credibility of the victim's identification by cross-examination and *proper jury* argument. Darden's testimony at trial included a denial of the offenses, and of [sic] an alibi, testimony which "appeared on its face to be sincerity." (Trial Judge's Findings of Fact for Sentence).
>
> In the context of the emotionally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman, *I have more than grave doubts* that the improper, repeated, prejudicial argument of the prosecution did not affect the jury in its deliberation. *I am convinced that the jury deliberation was substantially influenced by* the improper argument and that the jury was prejudiced against Darden by the argument.

Magistrate's Report on 22-23 (emphasis added). (J.A. 214-215).

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[19] The state trial judge also recognized that the prosecution's case on the issue of the identification of Mr. Darden is the killer was open to doubt. No other meaning can be ascribed to his finding Mr. Darden's repeated protestations of "complete innocence" as a mitigating factor. If guilt were clear, a defendant's protestations of innocence would hardly be deemed mitigating; they would more likely be interpreted as defiance.

The magistrate was correct. The ordinary problems of eyewitness identification aside,[20] cross-racial identification, as in this case, is the least reliable. Barkowitz and Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12 Journal of Applied Social Pschology, 4:255 (1982); Brigham and Maass, *Accuracy of Eyewitness Identifications in a Field Setting*, 42 Journal of Personality and Social Psychology 673 (1982); Yarmey, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 130-35 (1970); Note, *Did Your Eyes Decieve You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan.L.Rev. 969, 982 (1977). When that cross-racial identification is subject to legitimate challenge as influenced by suggestive procedures,[21] the prosecutor's impermissible attempts in argument either to bolster the identification or to obscure the issue cannot be discounted as unimportant or insubstantial.

McDaniel certainly did not think so. No prosecutor would risk reversal by engaging in such a calculated and extended cavalcade of unprofessional comments unless he felt unsure of his evidence and uncertain of a verdict. Again, this is not a case of an isolated or impromptu remark that might have harmed the defendant; this was a deliberate, internally coherent di-

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[20] There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, "[T]hat's the man!"

*Kampshoff* v. *Smith*, 698 F. 2d 581, 585 (2d Cir. 1983).

[21] In *Kampshoff*, supra, n.20, the eyewitness identification was impermissibly tainted by the fact that the witness saw a television broadcast of petitioner's picture. Here Mr. Arnold had seen newspaper accounts of Mr. Darden's arrest and Mrs. Turman first saw and identified Mr. Darden in a courtroom in which he was the only black.

atribe that repeated and intertwined three basic, impermissible themes. It ended in a carefully orchestrated crescendo affirming the reliability of the eyewitness identification on the basis of race and the need to convict both the defendant and the Department of Corrections. "Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Estelle* v. *Williams*, 425 U.S. at 504. Common sense indicates that there is no reason a senior, experienced prosecutor (*see* R. 749) would employ such impermissible techniques except to prejudice the jury and bolster a sagging case.

The courts below relied instead on various technical, "contextual" considerations in concluding that there was nevertheless no harm to the defendant. Their reasoning does not withstand scrutiny. For example, both the Florida Supreme Court and the district court relied heavily on the concept of invited error. The Florida court felt that the prosecutor's use of the term "animal" and the repeated expressions of his wish that the defendant had been shot or had killed himself were "invited" by defense counsel's concession that the assailant was an animal. While it is entirely unclear how this statement by the defense "invited" either the death wish statements or the other impermissible prosecutorial arguments, it is at least "[c]lear [that] two improper arguments—two separate wrongs—do not make for a right result." *United States* v. *Young*, 470 U.S. ___, 84 L.Ed.2d 1, 9 (1985).

Similarly, the district court asserted that the extensive and repeated expressions by both prosecutors of their personal beliefs that Mr. Darden was a liar, that he was guilty, and that his death was the necessary response to the irresponsibility of the Department of Corrections were somehow invited by the two relatively minor expressions of personal opinion by Mr. Maloney. 513 F.Supp. at 955. "Reviewing courts ought not to be put in the position of weighing which of two inappropriate arguments was the lesser." *Young*, 84 L.Ed.2d at 11. Nevertheless, it cannot fairly be said that two inappropriate remarks by a young defense counsel made in the throes of argument that expressed a personal opinion about the sufficiency and weight

of the evidence are the equivalent of—and will carry the same weight with the jury as—numerous, repeated, deliberate comments of a senior prosecutor expressing personal opinions about guilt and credibility. Indeed, it is apparently the rule both in Florida[22] and many other jurisdictions[23] that the expression of personal opinion regarding the weight of the evidence, as distinct from guilt or innocence, is permissible.

According to the analysis of the district court, the argument by Maloney that the evidence was not enough "to kill that man [Darden,]" made at the end of his summation, R. 737, opened the door to the prosecutor's arguments for the death penalty. 513 F.Supp. at 953-54. (J.A. 243-244) The problem with that analysis is threefold. First, at most, it invited the prosecutor to respond—as he did in part—that the question of sentence would be dealt with later and that only guilt or innocence was at issue at that stage. Second, even if one assumes that it also invited the prosecutor to remark that he would seek the death penalty at the appropriate time, it certainly did not invite him to make his entire sentencing argument at the guilt/innocence stage as the district court found he did. 513 F.Supp. at 953 & n.10. (J.A. 243-244) Third, the judge had already ruled at the start of Maloney's summation that the identical comment was proper. R. 730. As *Young* makes clear, the primary responsibility for controlling improper argument lies with the trial judge. 84 L.Ed.2d at 11. Here it was the trial judge who allowed the escalating juggernaut of improper argument to get started. Mr. Darden should not pay for that with his life.

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[22] *See, e.g., Roundtree* v. *State*, 229 So.2d 281 (1st DCA 1969), *app. dismissed*, 242 So.2d 136 (Fla. 1970); *Coleman* v. *State*, 215 So.2d 96 (Fla. 4th DCA 1968).

[23] "Though prohibiting the expression of a personal conviction as to defendant's guilt, courts have accepted statements offered as a personal conclusion as to the strength of the evidence." Y. Kamisar, W. LaFave, & J. Israel, MODERN CRIMINAL PROCEDURE 1450 (5th ed. 1980); *see also* Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J.Crim.L. & C. 22, 45-46 (1973); Annotation, 88 A.L.R.3d 449 (1978).

The Florida Supreme Court relied on two other considerations in finding no error: "the totality of the record . . . in these uniquely vicious crimes . . ." and the "overwhelming eyewitness and circumstantial evidence." 329 So.2d at 290, 291. At best, however, the heinous nature of the crime excused only the "animal" comments. The strength of the eyewitness testimony was the very thing the prosecutor was seeking to bolster by impermissible argument. Neither of these considerations can establish "harmless error . . . in this particular case." 329 So.2d at 290. (J.A. 50).

Finally, the lower federal courts relied on one more technical argument: "the Court instructed the jury on two occasions that the argument of counsel was not evidence. . . ." 699 F.2d at 1036 (quoting 513 F.Supp. at 958). (J.A. 278) In fact, there was *one* such instruction, but it came *before* the prejudicial summation. *See* nn. 15-16 *supra*. Afterward, the court gave *no* instructions touching the question of arguments; it did tell the jury during the course of a lengthy charge that it should consider only the evidence. But that was too little, much too late. *Compare Caldwell*, 86 L.Ed.2d at 249, 252 (Rehnquist, J., dissenting).

Recent decisions of the Eleventh circuit would require that a defendant show "a reasonable probability that, but for [the improper prosecutorial] arguments, the death penalty would not have been given." *Brooks* v. *Kemp*, 762 F.2d 1383, 1413 (11th Cir. 1985) (en banc).[24] They would apply this standard even when the court "cannot conclude that these few improper remarks had no prejudicial effect on the jury . . . ," if the court is "satisfied that the prejudice was not severe.: *Id.* at 1415. Putting aside the question whether these decisions survive *Caldwell*, their standard would not control Mr. Darden's case; here, the improper remarks were not "few" nor was the prejudice less than "severe." Here, the remarks were calculated to obscure the central issues and did so, to Mr. Darden's actual

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[24] *Accord Drake* v. *Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc); *Tucker* v. *Kemp*, 762 F.2d 1480 (11th Cir. 1985) (en banc); *Tucker* v. *Kemp*, 762 F.2d 1496 (11th Cir. 1985) (en banc).

and substantial prejudice. It is difficult to imagine a more egregious and deliberate closing argument than that in this case. The prosecutor's incendiary argument was tossed into the powder keg of a black/white killing, with sexual advances on the victim's widow, where the primary factual question was whether the police had arrested the right "colored male." (J.A. 32). Because the extensive improper remarks were of a sort calculated to interfere with the reliability of the jury's determination, "we cannot say that this effort had no effect . . . ," *Caldwell*, 86 L.Ed.2d at 247. Petitioner's conviction and sentence of death must be reversed.

## II. THE EXCLUSION FOR CAUSE OF VENIREMAN MURPHY CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN *WAINWRIGHT* V. *WITT*, UNDER WHICH OPPOSITION TO CAPITAL PUNISHMENT ALONE IS AN *INSUFFICIENT BASIS FOR DISQUALIFICATION*.

In *Wainwright* v. *Witt*, 469 U.S. ____, 83 L.Ed.2d 841 (1985), this Court modified the test of *Witherspoon* v. *Illinos*, 391 U.S. 510 (1968), which governs the exclusion of prospective jurors in capital cases on the basis of their views about capital punishment. The Court was careful to state, however, that it "adhere[d] to the essential balance struck by the *Witherspoon* decision." 83 L.Ed.2d at 852 n.5. That "essential balance" prohibits the exclusion for cause of "jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Id.* at 850. In other words, opposition to capital punishment alone is not a sufficient basis for disqualification. Something more must be shown.

To be sure, *Witt* did modify the *Witherspoon* test as to precisely what more must be shown. Applying the standard of *Adams* v. *Texas*, 448 U.S. 38 (1980), the Court held as follows:

> [A] juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his*

> *duties as a juror in accordance with his instructions and his oath.*

83 L.Ed.2d at 849 (emphasis in original) (quoting *Adams*, 448 U.S. at 45); 83 L.Ed.2d at 851-52. But in the absence of the showing required by *Witt*,[25] a venire member may not be excluded simply because he holds strong views against capital punishment.

Measured by these principles, the exclusion for cause of venireman Murphy at petitioner's trial cannot be upheld. For Murphy was excused solely on the basis of the following question and answer:

> THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable *without violating your own principles* to vote to recommend a death penalty regardless of the facts?
>
> MR. MURPHY: Yes, I have. (J.A. 9).

R. 165 (emphasis added). The trial judge never determined whether or not Murphy's "own principles" relating to capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Murphy was never once questioned as to whether he could set aside his personal beliefs or private principles and perform "his duties as a juror in accordance with his instructions and his oath." Instead, he was summarily excluded solely because of his affirmative answer to a single question demonstrating only that he held strong principles in opposition to capital punishment—principles which he would have to subordinate if he were to serve as a juror. Whether or not he could in fact subordinate those principles and serve was never determined.

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[25] *Witt* also reiterates that, "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." 83 L.Ed.2d at 851.

The only way to uphold Murphy's exclusion would be to assume that any individual who has strong principles against capital punishment would *automatically* be unable to restrain those principles and would therefore be "substantially impaired" in the performance of his duties as a juror. But that is not the law. The very essence of the *Witherspoon* balance, adhered to in *Witt*, cries out to the contrary:

> It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he preceived to be his duty to abide by his oath as a juror and to obey the law of the State.

*Witherspoon* v. *Illinois*, 391 U.S. at 514-15 n.7. *Adams* v. *Texas*, the decision upon which *Witt* is based, makes the same controlling point:

> [I]t is entirely possible that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

448 U.S. at 44-45 (quoting *Boulden* v. *Holman*, 394 U.S. 478, 483-84 (1969). Thus, to say that Murphy's exclusion may be upheld because he could not vote for capital punishment without violating his own strong principles is a complete *non sequitur*. At no time was it shown that Murphy would have any difficulty curbing those principles, following the law, and doing his civic duty as a responsible juror in accordance with his instructions and his oath.

In *Witt*, this Court upheld the exclusion of a venire member who admitted that her personal views about capital punishment would interfere with the performance of her duties as a juror. 83 L.Ed.2d at 846. Unlike venire member Colby in *Witt*, Murphy here said no such thing. The difference between the two prospective jurors was succinctly stated by Judge Johnson of the Eleventh Circuit, dissenting from that Court's affirm-

ance of the denial of habeas corpus relief upon remand from this Court:

> Colby stated that a conflict between belief and duty would interfere with performance of duty, while Murphy said only that a conflict would exist. The fact that a conflict exists between belief and duty tells a judge absolutely nothing about how the juror will react when faced with that conflict.

*Darden* v. *Wainwright*, 767 F.2d at 759 n.3. (J.A. 389).

Because the trial judge did not employ the correct standard in questioning Murphy, this Court should not defer under *Witt* to the judge's finding that the venireman deserved to be excluded. Recognizing that the judge's understanding and application of the correct standard is central to a determination that the exclusion was presumptively correct, this Court in *Witt* looked closely at the standard employed by the trial judge:

> [T]here is every indication that the judge indeed applied the correct standard. Although the judge did not participate in questioning venireman Colby, the record shows that on several subsequent occasions during voir dire he did participate in questioning. On each of those occasions the judge asked questions entirely consistent with the *Adams* standard.

83 L.Ed.2d at 856.

In the present case it was the trial judge himself who personally questioned the venireman at issue. His questioning of Murphy was hardly "consistent with the *Adams* standard." Furthermore, as noted in Judge Johnson's dissent below, the trial judge announced this incorrect standard at the very opening of the voir dire and again at a later point after Murphy's exclusion. 767 F.2d at 755-57. (J.A. 387-388) And the exclusion for cause resulted solely from his failure to employ the correct standard—not from any ambiguity or indecisiveness in the venireman's answer. Murphy gave a direct and straightforward answer—"Yes, I have"—but to the wrong question. That was the only question directed at him concerning his views

about capital punishment.[26] In contrast to *Witt*, where Mr. Colby answered six questions on the subject, there was no colloquy here which could give rise to any presumption of a finding as to demeanor or credibility.[27]

This is simply a case in which the trial judge employed a constitutionally incorrect standard in his questioning of a prospective juror and, therefore, obtained a constitutionally inadequate answer. Habeas corpus relief should be granted.[28]

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[26] Murphy had just been seated in the jury box a moment earlier, and had not been the subject of any previous group or individual questioning about capital punishment. R. 165. (J.A. 9).

[27] The Court below erroneously stated that defense counsel did not object to Murphy's exclusion. 767 F.2d at 754. (J.A. 379) At the outset of the voir dire, during the same discussion in which the trial judge announced that he would exclude any venire member who "if he did follow it [the law], would be going against his principles," the judge granted defense counsel a *continuing* objection to such exclusions. R. 18-19. (J.A. 6-7) Following Murphy's exclusion the judge explicitly directed the court reporter to note defense counsel's objection pursuant to that ruling. *Id.* at 165.

[28] Although the jury's role in sentencing in Florida capital cases is advisory, the trial judge may not overrule a jury recommendation of mercy unless " 'the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ.' " *Proffitt* v. *Florida*, 428 U.S. 242, 249 (1976) (plurality opinion). *Witherspoon*, of course, applies to the selection of any "jury that imposed *or recommended*" a death sentence. *Witherspoon* v. *Illinois*, 391 U.S. at 522 (emphasis added); *see id.* at 518 n.12. And this Court has expressly held that even one unconstitutional exclusion for cause requires reversal of the sentence of death. *Davis* v. *Georgia*, 429 U.S. 122 (1976).

## III. PETITIONER'S DEATH SENTENCE SHOULD BE VACATED BECAUSE HE WAS BEREFT OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHICH DEPRIVED HIM OF A FULL, FAIR, AND INDIVIDUALIZED DETERMINATION OF WHETHER HE SHOULD LIVE OR DIE.

A capital sentencing proceeding in which the sentencer cannot give

> independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for less severe penalty.

*Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978). Without consideration of "compassionate and mitigating factors stemming from the diverse frailties of humankind," a capital defendant would be but one of a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). *Accord Zant* v. *Stephens*, ___ U.S. ___, 77 L.Ed.2d 235, 251 (1983).[29] Accordingly, the Court has vacated death sentences imposed where nonstatutory mitigating evidence was precluded either by statute, *Lockett* v. *Ohio;* by state court practice, *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 (1982); or by state rules of evidence, *Green* v. *Georgia*, 442 U.S. 95, 97 (1979). This case asks whether the same relief is due when that deprivation is caused by counsel's mistakes.

At the habeas hearing before the magistrate, trial counsel Maloney explained the failure to develop and present nonstatutory mitigating evidence as premised on an understanding that the Florida statute precluded such evidence. "[A]fter a perusal of the mitigating circumstances in the Florida Statute 921.141 [,] . . . we reached the conclusion that Mr. Darden did not qualify" for any of the statutory factors. H.C.

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[29] Such evidence "may make a critical difference, especially in a capital case." *Stanley* v. *Zant*, 697 F.2d 955, 969 (11th Cir. 1983).

154. (J.A. 163). In apparent candor, Maloney conceded: "I was completely unaware that any mitigating circumstance, if relevant, is admissible." *Id.* (J.A. 162).

Counsel's interpretation of the statute had some support,[30] and was even adopted in some later Florida cases,[31] but it made

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[30] Florida's 1972 capital sentencing statute confined the jury's sentencing deliberations to three issues:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and
>
> (b) Whether sufficient mitigating circumstances exist *as enumerated* in subsection (7), which outweigh aggravating circumstances found to exist, and
>
> (c) Based on these considerations whether the defendant should be sentenced to life or death.

Fla. Stat. § 921.141(2)(a), (b), (c) (emphasis added). The judge's ultimate decision operated within the same statutory confines. Fla. Stat. § 921.141(3). *See, e.g.*, Vance, *The Death Penalty After Furman*, 48 Notre Dame Lawyer 850, 855 (1973) (Under the new Florida statute, "capital felonies and their attendant aggravating or mitigating circumstances are carefully spelled out.").

Not only did the statute appear restrictive on its face; the Florida legislature intended it to be. *See* Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett* v. *Ohio, and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal. L. Rev. 317, 358 n.199 (1981). Soon after *Lockett* announced the constitutional requirements that mitigating evidence be unrestricted, the Florida legislature amended the statute. It deleted the words of restriction, "as enumerated in subsection (7)," from subsection (2)(b)'s reference to mitigating circumstances, and specifically added a clause to permit the introduction of evidence of "the nature of the crime and the character of the defendant." 1979 Fla. Laws ch. 79-353. These provisions would not have been necessary unless the prior statute was indeed restrictive.

Six months before petitioner's trial, the Florida Supreme Court had interpreted the statute as restricting the scope of mitigating evidence. *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973).

[31] *Cooper* v. *State*, 336 So.2d 1133, 1139 n.7 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). *See also Gibson* v. *State*, 351 So.2d 948, 951

no sense in the context of Mr. Darden's case. For the trial court repeatedly and emphatically assured the defense that it could "go into any other facts [beyond the statute] that might really be pertinent to full consideration of [petitioner's] case and the analysis of [petitioner] and [his] family situation, [his] causes or anything else that might be pertinent to what is the appropriate sentence." R. 887; *accord* R. 883-84, 888, 904. Counsel failed to understand the critical value of presenting factors broader and more personal than those embodied in the narrow statutory list.

Instead, counsel's principal pre-sentencing preparation consisted of one twenty minute interview in the course of a forty minute court recess. H.C. 373. Though the court offered to recess the trial for several days so that counsel could properly prepare for sentencing, R. 874, defense counsel preferred to "proceed[] rather quickly before the Jury," asking only for "10 or 15 minutes with the Defendant prior to starting this." R. 875.

Counsel made no effort to inform themselves of Mr. Darden's previous reputation for friendliness, good character, and non-violence.[32] Misfortunes in Mr. Darden's past—such as a life of extreme poverty and social deprivation, the premature death of his mother and its lasting effects on him, the desertion of his father and stepmother, the harsh treatment of North Carolina reform authorities who committed him to a juvenile institution for four years for pilfering a mailbox—never entered the decision on death. Because of counsel's misperception of the scope of a capital sentencing proceeding, neither judge nor jury was informed of even the nonstatutory information of value already available to defense counsel in two psychiatric reports. R. 885-86. One of these reports made note of petitioner's circumstances from childhood on and indicated

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& n.6 (Fla. 1977); *Barclay* v. *State*, 343 So.2d 1266, 1270-71 (Fla. 1977); *Songer* v. *State*, 322 So.2d 481, 484 (Fla. 1975).

[32] Mr. Darden had a previous conviction for assault with intent to commit rape. *Darden* v. *State*, 218 So.2d 485 (Fla. 2d DCA 1969).

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that he ran several businesses successfully, was well liked in the community, was considered non-violent by his acquaintances, and functioned—no doubt in large measure because of his early deprivations—at the dull normal I.Q. of 88.[33]

Trial counsel's poor performance had important eighth amendment consequences. It cost him the opportunity to present evidence of a difficult, stunting upbringing and a prior reputation for a solid, nonviolent character. Instead, it resulted in a sentencing presentation that lasted only a few minutes, occupying seven pages of transcipt. It cost him a closing argument, a last opportunity for a professional advocate to weave the widely varying threads of petitioner's circumstances and times into a life, and give meaning and depth and significance to it, in the jury's sentencing decision.

This Court has recently articulated a two-pronged standard for adjudicating claims of "actual ineffectiveness" of counsel. The performance component requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, ____ U.S. ____ , 80 L.Ed.2d 674, 693 (1984). *See also Smith* v. *Wainwright*, 741 F.2d 1248, 1254 (11th Cir. 1984). The second prong demands a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different," *Strickland*, 80

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[33] Some nonstatutory mitigating evidence did find its way into the record, nevertheless. At the court's urging, Mr. Darden rose again to profess his innocence ("emotionally and with what appeared on its face to be sincerity") and to advise the jury that he was the father of a family of seven children. The trial court, demonstrating foresight unusual for the times, made note of these factors in his sentencing report. *But see. Darden* v. *State*, 329 So.2d 287, 291 (Fla. 1976) (where the Florida Supreme Court observed that there were "no mitigating circumstances to reduce the penalty from death"). (J.A. 50). Here again, however, counsel's judgment and training in persuasion were never brought to bear on this information and its presentation. Counsel's function shrivelled from advocate to mere presence in the courtroom.

L.Ed.2d at 698. *See Smith*, 741 F.2d at 1254. The Court defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 80 L.Ed.2d at 698.

In *Strickland*, defense counsel offered no further evidence at sentencing because of a "sense of hopelessness about the evidentiary effect of [the defendant's] confession" and because offering no evidence permitted him to argue facts about the defendant's background presented at an earlier plea colloquy without subjecting his client to cross-examination. 80 L.Ed.2d at 684. Counsel also knew that the judge favored "a convicted defendant who owns up to his crime." *Id.* at 685. On this basis, counsel in *Strickland* made an extensive closing argument, *id.* at 684, which the trial judge found "admirable." *Id.* at 686. In *Strickland*, the Court concluded that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 695. It concluded that, in the circumstances of that case, counsel's performance was reasonable.

Here, defense counsel's preparation for and presentation of a case at the sentencing phase were not reasonable. The decision not to investigate was not an informed, tactical judgment. Rather, it was reached because counsel neither knew the law nor attempted to investigate and find out the law governing sentencing. Indeed, even after the trial court made it clear that nonstatutory mitigating factors would be considered and that a continuance would be allowed so that counsel could prepare properly, counsel nevertheless rushed the case to judgment; they failed even to present the nonstatutory mitigating evidence already available to them. Counsel's argument on sentencing was hardly professional, much less "admirable," consisting of only a short statement that served to highlight the aggravating rather than the mitigating circumstances.

Unlike *Strickland*, where the Court concluded that the "overwhelming" evidence in favor of death made it improbable "that the omitted evidence would have changed the conclusion," 80 L.Ed.2d at 701, the substandard performance of

counsel in this case mattered very much. For the prosecutor argued extensively that Mr. Darden was no better than an animal, that he should be put to death because otherwise the prison system would release him again, and that society was already unlucky that Mr. Darden had not managed to kill himself. All of this was both beyond the record and beyond the pale. The sentencing hearing began only an hour later, in the wake of that argument. Had counsel offered the nonstatutory evidence discussed above, it might at least have counteracted these impermissible arguments. It would have offered the jury—which, without such evidence, nevertheless split over the question of punishment—information upon which it could have relied in considering life as an appropriate sentence for someone who was a human being with "the diverse frailties of humankind." *Woodson*, 428 U.S. at 304. Instead, it was urged to consider whether to extinguish an "animal" and thus strike a blow against an errant prison system.

*Lockett* and *Eddings* emphasize that: "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the charcter and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, 428 U.S. at 304. "A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to insure that the adversarial process works to produce a just result . . . .' *Strickland*, 80 L.Ed.2d at 693.

Here, counsel failed altogether to submit the question of life or death to adversarial testing, even after the trial judge invited them to do so and suggested a continuance. The prosecutor, on the other hand, had missed no opportunity to press home his point that "the animal" deserved death by execution if not by his own hand. Here, "the core purpose of the counsel guarantee" was thwarted; "confronted with both the intricacies of the law and the advocacy of the prosecutor . . .,"

*United States* v. *Ash*, 413 U.S. 300, 309 (1973), Mr. Darden was left with no assistance on either score. Rather, he literally stood up for himself, alone. Because this sentencing "Process los[t] its character as a confrontation between adversaries," and became instead the "sacrifice of unarmed prisoners to gladiators . . .," *United States* v. *Cronic*, ___ U.S. ___, 80 L.Ed.2d 657, 666-67 (1984) (quoting *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 640 (7th Cir. 1974)), the resulting sentence of death should be reversed.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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